APPENDIX.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 160. HABEAS CORPUS.

UNITED STATES OF AMERICA, EX REL. THEODORE ROOSEVELT POTTS,

v.

ROBERT W. RAAB, U. S. MARSHAL, MIDDLE DISTRICT OF PENNSYLVANIA.

Opinion.

October 20, 1943, Theodore Roosevelt Potts and others were indicted (No. 10,984 October Term, 1943) and, in the indictment were charged with violation of the laws of the United States. November 15, 1943, Potts and the other defendants were detained in the custody of the marshal pursuant to processes of this court issued upon the indictment referred to. On the same day all of the Defendants were called for arraignment. They appeared in the court room before the Judge, and counsel for each defendant presented a petition for a writ of Habeas Corpus. On the same day after hearing in open court and, upon due consideration, the prayers of the petitions were denied. The petition of Potts, which is the only case I shall discuss in this opinion, alleges that he is illegally in the custody of the United States Marshal for this district, because there are two indictments pending against him charging the same offense involving the same facts and evidence, and that he is, therefore, unlawfully restrained upon a charge for which he has been

previously indicted, and which said previous indictment has not "been discharged, quashed, or withdrawn." The Petitioner has not yet gone to trial under either indictment, and the present petition for Habeas Corpus is in advance of trial. On November 20, 1943 a Nolle Prosequi was entered as to the first or previous indictment (No. 10,787 December Term, 1942). Therefore, the question as to whether the Petitioner is entitled to a writ of Habeas Corpus for the reason set forth in the petition and above referred to is moot. However, in my opinion, the reason is entirely without merit. Kastel v. U. S. (CCA.2) 30 Fed. (2d) 687, and cases there cited.

It is further alleged in the petition that no witnesses testified, nor could any witness testify before the Grand Jury which returned the second indictment who could legally give competent evidence of the charge set forth in the said indictment. This is clearly an attempt to test the legal sufficiency of the indictment by collateral proceedings. The Supreme Court has definitely pointed out that such proceedings are improper. Glasgow v. Moyer, 225 U. S. 420, 429. If it were permissible for defendants to test the validity of indictments by proceedings of this character the result would be intolerable confusion in the administration of justice, and such was not the intention of Congress when it vested the courts with power to issue writs of Habeas Corpus. Ex parte, Finn, 16 Fed. Supp. 1.

It appears from the petition itself that the Petitioner was not entitled to a writ of Habeas Corpus, and the prayer of the petition was, therefore, denied.

ALBERT L. WATSON,
United States District Judge.

Scranton, Pa.
Dec. 3, 1943.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 8543. October Term, 1943.

UNITED STATES OF AMERICA, EX REL THEODORE ROOSEVELT POTTS,
Appellant,

v.

ROBERT W. RABB, UNITED STATES MARSHAL FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Before BIGGS, JONES AND GOODRICH, *Circuit Judges.*

OPINION OF THE COURT.

(Filed February 14, 1944.)

By BIGGS, *Circuit Judge.*

The appeal at bar, stripped to its essentials, requires us to decide the question of whether an individual, arrested upon a bench warrant issued under an indictment, may test by writ of habeas corpus the sufficiency of the evidence before the grand jury which returned the indictment.

The indictment charges the appellant with a conspiracy to defraud the United States in connection with the construction of a naval depot at Mechanicsburg, Pennsylvania. It was returned by a duly constituted grand jury of the District Court of the United States for the Middle District of Pennsylvania. After its return the appellant was advised by the United States Attorney to appear in court on November 15, 1943 for arraignment. When the appellant came into court his counsel filed a petition for

a writ of habeas corpus. The court decided that the appellant was not entitled to the writ because he was not in custody. The United States Attorney then asked for and received a bench warrant for the arrest of the appellant. He was arrested in the courtroom by the United States Marshal. His counsel immediately filed a second petition for a writ of habeas corpus.

The appellant's second petition asserted (as did his first) that no witness testified before the grand jury who could or did give legally competent evidence against him. He contends, therefore, that the bench warrant was issued without probable cause and in derogation of his rights under the Fourth Amendment to the Constitution of the United States.[1] The court again refused to issue the writ.[2] About two hours later the court admitted the appellant to bail which he immediately made. A few days later the appellant filed a motion to quash the indictment,[3] the grounds of the motion being those stated in his petitions for habeas corpus.

The appellant in effect argues that because there was a short period of time following his arrest on the after-

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[1] The history and development of the Fourth Amendment show that it guarantees the right of the individual to be secure in his person against unreasonable arrests, as well as against unreasonable searches of houses and seizure of papers and effects. See "The History and Development of the Fourth Amendment to the United States Constitution", Lasson, Series LV No. 2 of the Johns Hopkins University Studies in Historical and Political Science, 1937, and in particular pp. 35, 95, 117 and 132 and the authorities and notes cited therein.

[2] The court in its opinion dated December 3, 1943, gave the reasons for its refusal, stating, inter alia, "If it were permissible for defendants to test the validity of indictments by proceedings of this character the result would be intolerable confusion in the administration of justice, and such was not the intention of Congress when it vested the courts with power to issue writs of Habeas Corpus. Ex parte, Finn, 16 F. Supp. 1."

This decision has not been reported.

[3] This has been made part of the record before us.

noon of November 15, 1943 in which he was in the custody of the United States Marshal he is entitled to prosecute this appeal despite the fact that he was admitted to bail a little later upon the afternoon of that very day. We cannot agree. The appeal at bar is moot. It was moot even when the notice of appeal was filed on November 29, 1943.

The writ of habeas corpus is one of the great writs upon which the liberty of the individual depends. Its grant cannot be permitted to turn upon an academic question of whether at a given instant of time an individual was within the custody of a United States marshal when in fact he was enlarged on bail a few hours later. Indeed, if we were to reverse the order of the court below and direct it to grant the writ, our mandate would be a nullity for the appellant is not presently deprived or restrained of his liberty. See the actual wording of R. S. Par. 754, 28 U. S. C. A. Par. 454.[4] Cf. the facts of Ex parte Catanzaro, 138 F. (2nd) 100, 101 (CCA 3).

But quite aside from the foregoing, the learned District Judge committed no error in denying the petition for the writ. The courts of the United States have held almost without exception that the writ of habeas corpus will not serve as a writ of error. Knewel, Sheriff, v. Egan, 268 U. S. 442; Frank v. Mangum, 237 U. S. 309; Valentina v. Mercer, 201 U. S. 131; Horner v. United States, 143 U. S. 570; Ex parte Mason, 105 U. S. 696; Ex parte Carll, 106 U. S. 521; In re Frederich, 149 U. S. 70, 75. The court below had jurisdiction of the appellant and of the offense with which he is charged. As we have stated the appellant has raised substantially the same objections to the sufficiency of the indictment in his motion to quash as he has in his petition

[4] R. S. Sec. 754 provides in part: "Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known."

for habeas corpus. His rights under the Fourth Amendment can be protected fully under the motion to quash. If there was no legally competent evidence before the grand jury which returned the indictment, that fact can be ascertained on the hearing of the motion. See In re Lancaster, 137 U. S. 393, 395; Brady v. United States, 24 F. (2nd) 405, 407-408; Nanfito v. United States, 20 F. (2nd) 377, 378; United States v. Rubin, 218 F. 245, 247-250.

The appeal is dismissed as moot.

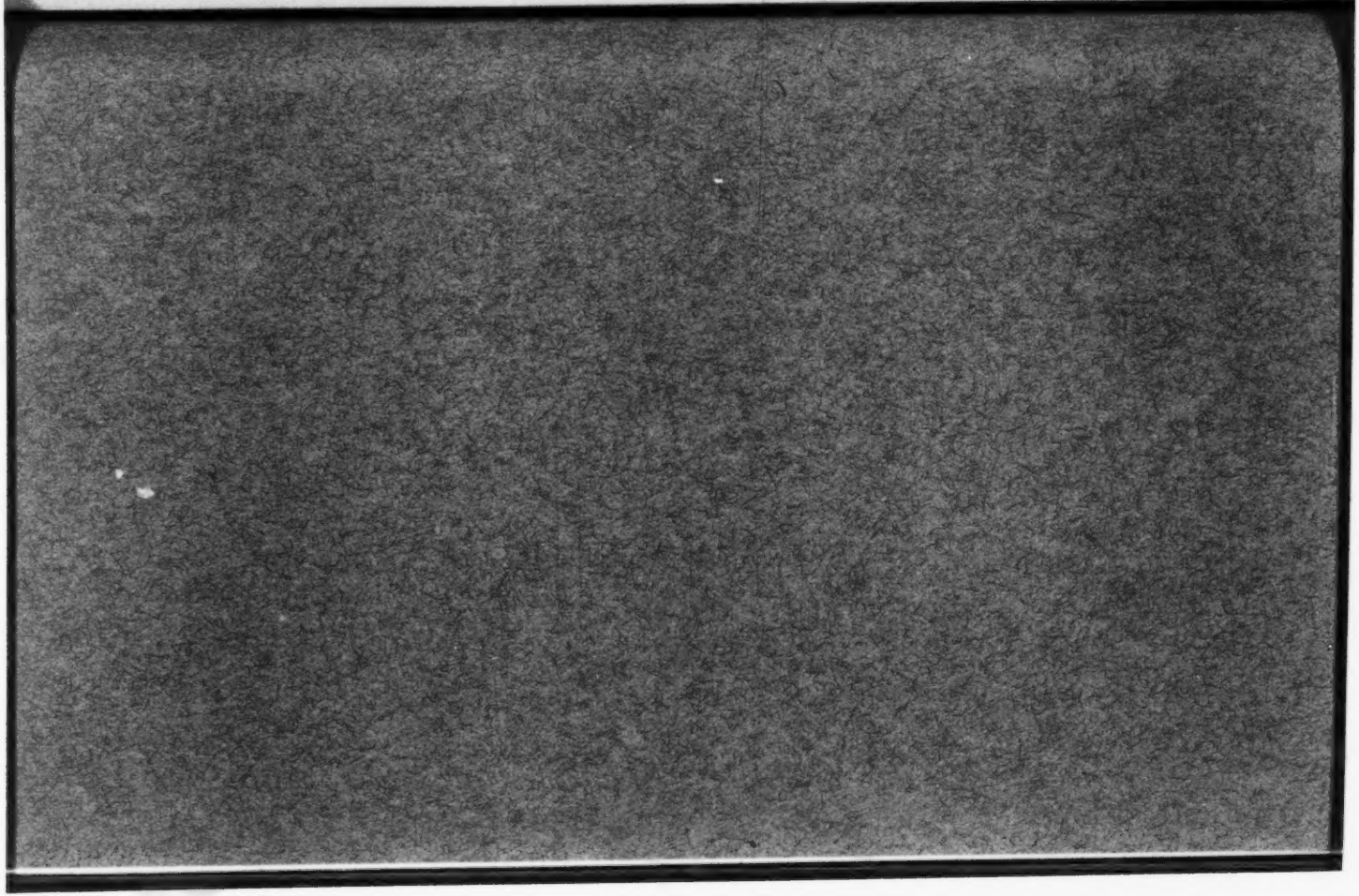

TABLE OF CASES

580927—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 763

UNITED STATES OF AMERICA, EX REL. THEODORE ROOSEVELT POTTS, PETITIONER

v.

ROBERT W. RABB, UNITED STATES MARSHAL FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

On October 20, 1943, a grand jury impaneled for the October 1943 term of the District Court of the United States for the Middle District of Pennsylvania returned an indictment against petitioner and others charging them with conspiracy to defraud the United States in connection with the construction of the Naval Supply Depot at Mechanicsburg, Pennsylvania (R. 1, 3–7). On November 3, 1943, the United States Attorney advised one of the defendants' attorneys by letter to have the defendants appear in court on November 15, 1943, for arraignment on that

indictment (R. 14, 59). When petitioner appeared in court with counsel on the latter date, he filed a petition for a writ of habeas corpus alleging that he was being unlawfully restrained in the custody of respondent, the United States Marshal for the Middle District of Pennsylvania, because a prior indictment returned against him at the December 1942 term had not been discharged or withdrawn, and for the further reason that no witnesses testified before the October 1943 term grand jury who could or did give legally competent evidence of the charge set forth in the indictment returned by that body (R. 14, 26–27). The court refused to grant the writ on the ground that petitioner was not in the custody of respondent. Immediately thereafter the United States Attorney secured a bench warrant for the arrest of petitioner and petitioner was arrested by respondent in the court room. Petitioner's counsel thereupon renewed the application for a writ of habeas corpus. (R. 14.) The court denied the application on the grounds that it constituted a collateral attack upon the legal sufficiency of the indictment and that the matters asserted therein should be raised by a motion to quash (R. 1–2, 14). Petitioner then pleaded not guilty to the indictment and a few hours later he was released on bond (R. 14–15).

On November 26, 1943, petitioner filed a motion to quash the indictment on the ground that no competent evidence was produced before the

grand jury (R. 29–30, 31, 34, 41–45). The United States Attorney interposed a motion to strike and an answer to petitioner's motion (R. 54–58), and on December 9, 1943, a hearing was held on these motions, after which the court took them under advisement and set the case for trial on January 3, 1944[1] (R. 16–17, 31, 34–35).

In the meantime, on November 29, 1943, petitioner filed a notice of appeal from the order of the district court denying his petition for a writ of habeas corpus (R. 15, 33, 63). On December 22, 1943, on motion of petitioner (R. 15–19), the Circuit Court of Appeals for the Third Circuit ordered that trial of the indictment be stayed pending determination of the appeal (R. 60–61). On February 14, 1944, the Circuit Court of Appeals entered its opinion and judgment dismissing the appeal as moot (R. 62–65).

1. The court below properly dismissed petitioner's appeal. As shown above, he was released on bond in the criminal proceeding on November 15, 1943, within a few hours after the district court had denied his petition for a writ of habeas corpus, and he has been at large on bond since that date. It is well settled that one at liberty on bond in a criminal proceeding is not subject to such restraint as furnishes a basis for habeas

[1] Meanwhile, on November 30, 1943, the Government entered a *nolle prosequi* as to the prior indictment returned by the grand jury for the December 1942 term (R. 28, 34).

corpus. *Stallings* v. *Splain,* 253 U. S. 339, 343; *Johnson* v. *Hoy,* 227 U. S. 245, 247–248; *United States* v. *Tittemore,* 61 F. (2d) 909 (C. C. A. 7); *Unverzagt* v. *United States,* 5 F. (2d) 494 (C. C. A. 9), certiorari denied, 269 U. S. 566; *Godbersen* v. *United States,* No. 525 this Term, certiorari denied March 27, 1944. The cause was consequently rendered moot the instant petitioner was released.

2. Furthermore, the petition for a writ of habeas corpus was properly denied as a premature and collateral means of presenting an objection which orderly procedure required to be raised by motion in the criminal cause. *Jones* v. *Perkins,* 245 U. S. 390; *Goto* v. *Lane,* 265 U. S. 393, 401–402; *Rodman* v. *Pothier,* 264 U. S. 399, 402–403; *Johnson* v. *Hoy,* 227 U. S. 245, 247; *Glasgow* v. *Moyer,* 225 U. S. 420, 428–430; cf. *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 25. Such a motion, incorporating the objection to the indictment raised in the petition for habeas corpus, was in fact filed by petitioner following the denial of his petition, and that motion remains undecided. (See R. 16–17, 34–35, 41–45, 64.) As the court below indicated (R. 64), it is settled that a writ of habeas corpus will not lie, either before or after trial, to question the validity or sufficiency of an indictment which on its face does not present any question as to the jurisdiction of the court in which it is returned. *Glasgow* v. *Moyer,*

supra; Riggins v. *United States,* 199 U. S. 547, 550–551; *In re Chapman,* 156 U. S. 211, 217–218; *Horner* v. *United States,* 143 U. S. 570, 577–578; *In re Lancaster,* 137 U. S. 393, 395. It is not disputed that the district court has jurisdiction of petitioner and of the offense with which he is charged, and his right to a determination of the validity of the indictment is fully preserved and protected under his pending motion to quash (*In re Lancaster, supra; Brady* v. *United States,* 24 F. (2d) 405, 407–408 (C. C. A. 8); *Nanfito* v. *United States,* 20 F. (2d) 376, 378 (C. C. A. 8); *United States* v. *Rubin,* 218 Fed. 245, 247–249 (D. Conn.)); if the indictment is held good and petitioner is ultimately convicted, error, if any, in the trial court's ruling on the motion may be corrected on appeal from the judgment of conviction. *Riddle* v. *Dyche,* 262 U. S. 333, 335; *Johnson* v. *Hoy, supra; Glasgow* v. *Moyer, supra; Riggins* v. *United States, supra; In re Chapman, supra;* cf. *Roche* v. *Evaporated Milk Assn., supra,* at 27.[2]

[2] Petitioner's contention (Pet. 2–4) that he was entitled to a writ of habeas corpus as the only effective means of protecting his right under the Fourth Amendment against arrest without probable cause, is unavailing. For "in the court to which the indictment is returned, the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer." *Ex parte United States,* 287 U. S. 241, 250.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELBY FITZE,
Special Assistants to the Attorney General.

APRIL 1944.

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